

1
2 IN THE UNITED STATES DISTRICT COURT
3

4 FOR THE NORTHERN DISTRICT OF CALIFORNIA
5

6 BRANDEE TRIPP,
7 Petitioner,
8 v.
9 DAWN DAVISON,
10 Respondent.

No. C 07-05748 CW

ORDER DENYING
RESPONDENT'S MOTION
TO DISMISS AND
SETTING BRIEFING
SCHEDULE

11
12 On November 13, 2007, Petitioner Brandee Tripp, a prisoner
13 incarcerated at the California Institution for Women, through
14 counsel, filed a petition for a writ of habeas corpus, alleging
15 that the Governor violated her federally protected liberty interest
16 when he reversed her grant of parole. Respondent Dawn Davison
17 moves to dismiss the petition based on lack of exhaustion because
18 Petitioner failed to designate any of the claims in her California
19 Supreme Court petition as federal claims and because Petitioner did
20 not present one of her claims to the California appellate court.
21 Petitioner has filed an opposition.

22 Having considered all the papers filed by the parties, the
23 Court DENIES the motion to dismiss and sets a briefing schedule on
24 Petitioner's petition.

25 PROCEDURAL HISTORY

26 On February 11, 1981, pursuant to a guilty plea to second
27 degree murder, Petitioner was sentenced to fifteen years to life
28 for the July 3, 1979 murder of ten-year-old Tameron Carpenter. At

1 the time, Petitioner was twenty years old. At twelve hearings
2 between 1986 and 2001, the Board of Parole Hearings (Board) found
3 Petitioner unsuitable for parole. On November 6, 2002, at her
4 thirteenth parole hearing, the Board found Petitioner suitable for
5 parole. On April 4, 2003, former Governor Gray Davis reversed the
6 Board's grant of parole. On May 17, 2004, at her fourteenth parole
7 hearing, the Board again found Petitioner suitable for parole. On
8 October 11, 2004, Governor Arnold Schwarzenegger reversed the
9 Board's grant of parole.

Petitioner filed petitions challenging Governor Schwarzenegger's decision in the Monterey County superior court and the California court of appeal. On March 28, 2007, the court of appeal issued a reasoned opinion affirming the Governor's decision. See In re Tripp, 150 Cal. App. 4th 306 (2007). On August 15, 2007, the California Supreme Court denied Petitioner's petition for review without comment.

LEGAL STANDARD

18 Prisoners in state custody who wish to challenge their
19 confinement collaterally in federal habeas proceedings are first
20 required to exhaust state judicial remedies, either on direct
21 appeal or through collateral proceedings, by presenting the highest
22 state court available with a fair opportunity to rule on the merits
23 of each and every claim they seek to raise in federal court. 28
24 U.S.C. § 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-16 (1982);
25 Duckworth v. Serrano, 454 U.S. 1, 3 (1981); McNeely v. Arave, 842
26 F.2d 230, 231 (9th Cir. 1988). A district court may not grant the
27 writ unless state court remedies are exhausted or there are

1 exceptional circumstances. 28 U.S.C. § 2254(b)(1); Edelbacher v.
2 Calderon, 160 F.3d 582, 585 (9th Cir. 1998) (requiring "extremely
3 unusual circumstances"). The appropriate time to assess whether a
4 prisoner has exhausted his state remedies is when the federal
5 petition is filed. Id.; Brown v. Maass, 11 F.3d 914, 915 (9th Cir.
6 1993).

7 The exhaustion-of-state-remedies requirement is not
8 jurisdictional, but is rather a matter of comity. Granberry v.
9 Greer, 481 U.S. 129, 133-34 (1987). The doctrine gives the State
10 "the initial opportunity to pass upon and correct alleged
11 violations of its prisoners' federal rights." Picard v. Connor,
12 404 U.S. 270, 275 (1971) (citations omitted). The exhaustion
13 requirement is satisfied only if (1) the federal claim has been
14 "fairly presented" to the state courts, id.; Crotts v. Smith, 73
15 F.3d 861, 865 (9th Cir. 1996); or (2) no state remedy remains
16 available. Johnson v. Zenon, 88 F.3d 828, 829 (9th Cir. 1996).

17 To exhaust a claim, it is not sufficient to raise only the
18 facts supporting the claim; rather, "the constitutional claim . . .
19 inherent in those facts" must be brought to the attention of the
20 state court. Picard, 404 U.S. at 277. The state court must be
21 alerted to the fact that the prisoner is asserting claims under the
22 United States Constitution in order to be given the opportunity to
23 correct alleged violations of federal rights. Duncan v. Henry, 513
24 U.S. 364, 365-66 (1995). A claim is "fairly presented" only if the
25 petitioner either referred to specific provisions of the federal
26 constitution or federal statutes, or cited federal or state case
27 law analyzing the federal issue. Peterson v. Lampert, 319 F.3d

1 1153, 1158 (9th Cir. 2003)(en banc). The fair-presentation
2 requirement is not satisfied by the mere circumstance that the "due
3 process ramifications" of an argument may be self-evident.
4 Anderson v. Harless, 459 U.S. 4, 7 (1982). A general appeal to a
5 constitutional guarantee as broad as due process is not enough to
6 present the substance of such a claim to a state court. Gray v.
7 Netherland, 518 U.S. 152, 163 (1996); Gatlin v. Madding, 189 F.3d
8 882, 889 (9th Cir. 1999).

9 DISCUSSION

10 In her federal petition, Petitioner alleges the following four
11 claims: (1) the Governor's action violated due process because it
12 was based on incorrect "facts" and breached Petitioner's plea
13 agreement; (2) the Governor's reversal of Petitioner's parole grant
14 based on the finding that her parole poses an unreasonable risk of
15 danger to society is supported by no evidence; (3) the Governor's
16 decision violated due process because it established no nexus
17 between the immutable facts on which it was based and Petitioner's
18 current parole risk; and (4) interminable denial of Petitioner's
19 parole based on the facts of her unchangeable commitment offense
20 violates due process by amending her prison term to life without
21 possibility of parole. Petitioner's petition to the California
22 Supreme Court contained the same four claims. Petitioner's
23 petition to the California court of appeal contained three of these
24 claims, but did not include the third claim regarding lack of a
25 nexus between the Governor's factual findings and Petitioner's
26 current parole risk.

27 A review of Petitioner's petition to the California Supreme
28

1 Court reveals that it is replete with references to both state and
2 federal cases that cite United States Supreme Court authority for
3 the proposition that due process rights conferred by the federal
4 constitution require that some evidence support the Governor's
5 finding that Petitioner posed an unreasonable threat to society.
6 Because all of Petitioner's claims, including the lack of a nexus
7 claim, are aspects of this one claim, all the of the claims have
8 been fairly presented to the California Supreme Court and have been
9 properly exhausted.

10 The Court sets the following briefing schedule on Petitioner's
11 petition for writ of habeas corpus. Within thirty days from the
12 date of this order, Respondent shall file with this Court and serve
13 upon Petitioner and Petitioner's counsel an answer conforming in
14 all respects to Rule 5 of the Rules Governing Section 2254 Cases,
15 28 U.S.C. foll. § 2254, showing cause why a writ of habeas corpus
16 shall not be issued. Respondent shall file with the answer a copy
17 of all portions of the state record that have been previously
18 transcribed and that are relevant to a determination of the issues
19 presented by the petition.

20 If Petitioner wishes to respond to the answer, she shall do so
21 by filing a traverse with the Court and serving it upon Respondent
22 within thirty days of her receipt of the answer.

23

24 IT IS SO ORDERED.

25
26 Dated: 5/9/08

Claudia Wilken

CLAUDIA WILKEN
United States District Judge

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